In the Supreme Court of the United States

OCTOBER TERM, 1960.

No. 166.

PETER HOLM,

Petitioner,

against

THE AMERICAN SHIP BUILDING COMPANY,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI AND APPENDIX.

THOMAS V. KOYKKA,
1144 Union Commerce Building,
Cleveland 14, Ohio,
Counsel for Respondent.

ROBERT G. McCREARY, JR.,
Of Counsel.

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—MAIN 1-5847

TABLE OF CONTENTS.

Jurisdiction 1

Question Presented 1

Statement 2

A. The Accident 2

B. Disposition in the Lower Courts 4

Summary of Argument 6

Argument 7

A. Petitioner expressly relied upon Ohio law in the complaint as the exclusive theory of recovery and urged at the trial that Ohio law be applied to the case 7

B. This Court and the Courts of Appeal follow the rule that they will not consider issues raised for the first time on appeal 12

C. Petitioner's reliance upon Ohio law was correct; no maritime claim was involved 14

Conclusion 19

TABLE OF AUTHORITIES.

Cases.

Admiral Peoples, The, 295 U. S. 649 (1935) 16, 18

Caldaro v. B. & O. Railroad Co., 166 F. Supp. 833 (D. C. E. D. N. Y.—1956) 18

Curd v. Todd-Johnson Drydock, 213 F. 2d 864 (C. A. 5—1954) 9, 11, 18

Davis v. Department of Labor, 317 U. S. 249 (1942) 19

Dewey v. Des Moines, 173 U. S. 193 (1899) 9

Ford v. Parker, 52 F. Supp. 98 (D. C. Md.—1943) 18

Madison v. Phillips, 254 F. 2d 348 (C. A. D. of C.—1958) 14

Nelson v. County of Los Angeles, United States Supreme Court, February 29, 1960 13-14

Ray v. United States, 301 U. S. 158 (1937) 14

Standard Oil Co. v. Robins Drydock and Repair Co., 32 F. 2d 282 (C. A. 2—1929) 18

Union Pacific Railroad v. Johnson, 249 F. 2d 674 (C. A. 9—1957) 14

U. S. F. & G. Co. v. United States, 56 F. Supp. 452 (D. C. S. D. N. Y.—1944) 16

Valley Steamship Co. v. Wattaw, 244 U. S. 202 (1917) 12

Vega v. United States, 191 F. 2d 921 (C. A. 2—1951), cert. denied 343 U. S. 909, affirming 86 F. Supp. 293 (D. C. S. D. N. Y.—1949) 16-17

Virginia Railway Co. v. Mullens, 271 U. S. 220 (1926) 12

Federal Rules of Civil Procedure.

Rule 46 ..... 8, 11

Rule 51 11

TABLE OF CONTENTS OF APPENDIX.

(Attached.)

Answer 1b

TRANSCRIPT OF EVIDENCE ON TRIAL.

	Direct	Cross	Re-Direct
Peter Holm		3b	4b
Michael T Dougherty	5b		
A. W. Hass		5b	
Gordon Stafford	6b		

PLAINTIFF'S EXHIBITS.

2. Side View of Gangway 7b

1. View of Gangway from Top 8b

DEFENDANT'S EXHIBIT.

B. View of Gangway from Bottom 9b

In the Supreme Court of the United States

OCTOBER TERM, 1960.

No. 166.

PETER HOLM,

Petitioner,

against

THE AMERICAN SHIP BUILDING COMPANY,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI AND APPENDIX.

JURISDICTION.

The statement of jurisdiction contained in the petition (p. 2) is accurate except for the description of the action brought in the District Court.

The action was a civil action to recover damages for personal injury based upon alleged negligence under the laws of the State of Ohio, Ordinances of the City of Lorain, Ohio, and the rules of the common law.

QUESTION PRESENTED.

The statement of questions presented contained in the petition (p. 2) does not reflect at all the issue raised by the Court of Appeals' decision. We believe that only a single question is presented for review, as follows:

Did the Court of Appeals abuse its discretion in ruling that Petitioner, having lost his personal injury case on properly decided state grounds, may not for the first time

on appeal be heard to contend that federal law should be applied when, in the trial court, Petitioner expressly invoked and chose state law as the exclusive basis for his alleged right of recovery and at no time invoked federal law?

STATEMENT.

A. The Accident.

Respondent operated a shipyard at Lorain, Ohio. Petitioner was a custodian or shipkeeper (28a) who lived aboard the Steamer AYERS which was out of commission tied up at Respondent's dock. Petitioner was an employee of The Great Lakes Steamship Company, owner of the Steamer AYERS (28a).

Because of weather conditions, practically all Great Lakes vessels are withdrawn from navigation during the winter months. In late November of 1954, the Steamer AYERS was brought to Respondent's shipyard for repairs and winter lay-up, the crew was discharged, and Petitioner came aboard as shipkeeper (15a). He lived aboard by himself from then until March 8, 1955, the date of the accident.

The usual means of ingress and egress to vessels such as the AYERS is a boarding ladder (15a, 28a), consisting of rungs set between two sides of wood as distinguished from a gangway hereinafter described. Such ladders are used by the crew during the navigation season (15a, 5b herein) and also during the winter months when the vessels are laid up (28a).

Such ladders are furnished by the shipowner (15a, 28a) and had been used by Petitioner the previous winter when he had been a shipkeeper (28a).

On the day of the accident, March 8, 1955, the Steamer AYERS was equipped with regular boarding ladders as part of its normal equipment (28a).

However, Petitioner chose to use the shipyard gangway rather than the boarding ladder furnished by his employer (29a).

The gangway (variously referred to at trial as "gangway," "gang plank," "ramp," and "brow") was the property of Respondent (63a), and was erected by Respondent on the dock alongside the AYERS (64a) so that shipyard personnel engaged in making repairs to the Steamer AYERS, as well as to another vessel moored outside the AYERS, could go from the dock to the vessel (19a, 58a, 60a).

Various views of the gangway are shown in plaintiff's Exhibits "1" and "2" and defendant's Exhibit "B", reproduced in the appendix hereto.

The gangway was constructed of a steel framework of heavy angle iron 60′ to 70′ in length (65a) and 4′ wide (65a). It had a protective railing on both sides 30″ to 36″ high (65a). The floor of the gangway consisted of 4 heavy wooden planks running the length of the gangway, to which were spiked wooden cleats spaced at an average footstep apart (65a).

The head of the gangway was bolted by a king pin through a wing pan to a platform and the platform which was also Respondent's property was secured to the side of the vessel at deck level (63a, 64a). No part of the gangway, as distinguished from the platform, was in contact with the vessel (plaintiff's Exhibit "1"), and the foot of the gangway was equipped with a pipe roller (64a), which rested on the concrete surface of the dock (63a).

There were no witnesses to the accident claimed by Petitioner. The log sheet showed that he went out the main gate of the shipyard at 3:40 P. M. and returned at

5:45 P. M. (49a). After passing through the shipyard gate he walked a distance of about two city blocks through the shipyard (19a) and up the gangway, intending to board the AYERS. Before reaching the platform at the head of the gangway, he testified that he slipped, lost his grip on the railing and fell from the gangway (26a, 27a).

One of Respondent's watchmen making his rounds discovered Petitioner lying beneath the gangway at about 8:20 P. M. (56a). An ambulance was at once called and Petitioner was taken to the hospital (52a). The man who discovered Petitioner accompanied him to the hospital and testified that he smelled liquor on him (54a). Petitioner did not put in evidence the hospital admission records.

Petitioner had used Respondent's gangway instead of the ship's boarding ladder at least once a day for the last 3½ months before the accident (29a). He testified the gangway was slippery when wet (32a) and was wet (34a) in the sense that wood attracts moisture (40a) at the time of the accident (36a). There was testimony that the cleats were in good condition (54a) but Petitioner testified that due to use some of the cleats were in a worn condition (32a). He knew of that condition (32a), was familiar with the structural features of the gangway, including the hand-rail (30a), and knew that the gangway became slippery when wet (32a).

At the time of the accident the gangway was well illuminated (5b, 6b herein) and Petitioner testified that he was able to see the cleats and handrails as he went up the ramp and was able to distinguish each and every cleat (42a).

B. Disposition in the Lower Courts.

At the conclusion of the Petitioner's evidence Respondent moved for a directed verdict on the ground that taking the case as presented reasonable minds could not

differ in the conclusion that Respondent had discharged its duties toward Petitioner and that Petitioner was injured under conditions known to him, whereby he assumed the risk.

The motion was argued on both sides upon the stipulation, expressly laid down in Petitioner's complaint (3a, 4a) that recovery was sought under the common law of the State of Ohio.

The trial court granted Respondent's motion stating in effect as follows:

1. Petitioner's evidence must be given the most favorable interpretation it can possibly receive (67a).
2. Respondent's gangway was not the only available means of ingress and egress to the Steamer AYERS (69a, 72a).
3. There was an absence of proof that Respondent failed to construct a proper protective handrail on the sides of the gangway (70a).
4. Because of Petitioner's daily use of the gangway, he had more knowledge concerning it than did Respondent, and this was true whether he was a licensee or an invitee (70a, 71a, 72a).
5. There was an absence of evidence that Respondent knew of some condition which was unknown to Petitioner and which would require Respondent to give warning to Petitioner (73a).

The Court of Appeals unanimously affirmed, holding:

1. The case having been brought under Ohio law and having been tried without asserting any applicable principle of maritime law, Petitioner would not be permitted, upon cumulative authority both in the Courts of Appeal and the Supreme Court of the United States, to raise for the first time on appeal

the theory that admiralty law applied (petition p. 24).

2. Under Ohio law as laid down by the Supreme Court of Ohio and as recognized by the Court of Appeals, Petitioner, whether regarded as a licensee or an invitee, had failed to establish liability, and thus there was no error in directing a verdict for Respondent (petition p. 25).

SUMMARY OF ARGUMENT.

Only a single question is presented for review and no review of that question is warranted. The refusal of the Court of Appeals to consider a theory of Petitioner's case never urged in the trial court and opposed to his theory there advanced was an exercise of discretion in conformity with the practice of other Courts of Appeal and of this Court in regulating appellate procedure. This being the sole basis for the decision below which is sought to be certified, Petitioner fails to present any of the reasons given by Rule 19 of this Court or any other reason for the granting of review.

An additional reason why this Court should not review the exercise of discretion by the Court of Appeals is the fact that even if Petitioner had invoked maritime law in the trial court, that Court would have been constrained by well reasoned authority to have found, just as Petitioner originally urged, that his remedy was governed by the law of Ohio since no maritime claim is here involved.

ARGUMENT.

A. Petitioner expressly relied upon Ohio law in the complaint as the exclusive theory of recovery and urged at the trial that Ohio law be applied to the case.

Petitioner's complaint alleges that he was an invitee of Respondent and the allegations of negligence which were set out in the complaint and relied upon at the trial were as follows:

> "Fifth: That in violation of the duties and obligations imposed upon the defendant by the State of Ohio, ordinances of the City of Lorain, Ohio, and the rules of common law, the defendant by its agents, servants, workmen and employees, was careless and negligent:
>
> (a) In negligently and carelessly failing to construct a proper protective guard railing on the sides of said gangway;
>
> (b) In failing and neglecting to give proper notice to the employees of The Great Lakes Steamship Company, Inc., working on the Steamer J. BURTON AYERS, at the aforesaid time and place of the existence in that area of this dangerous condition,
>
> (c) In negligently and carelessly inviting and allowing the employees of The Great Lakes Steamship Company, Inc., particularly this plaintiff, to use said area when the defendant had actual and constructive knowledge or should have known of the slippery and worn condition of the gangway and also of the makeshift and improperly illuminated rails on the side of said gangway. (3a, 4a)"

This was the theory upon which Petitioner tried the case and the theory upon which Respondent was prepared to defend and the theory upon which each party made the record before the trial court.

Respondent's answer denied negligence and specifically raised the defenses—available under Ohio law—of contributory negligence and assumption of risk. (2b, 3b herein.) At no time did Petitioner move to strike these defenses or argue their inapplicability.

At the end of Petitioner's case Respondent moved for a directed verdict upon the grounds of failure of proof of negligence and assumption of risk under Ohio law. Petitioner argued the motion on the same basis. In granting said motion the Court clearly stated that its ruling rested on Ohio law. (70a). Although Petitioner took a general exception to the granting of said motion (73a), he did not, as required by Rule 46 F. R. C. P. make known to the trial court the **grounds** for objection later urged in the Court of Appeals or in any way suggest to the trial court that maritime principles should apply.

This was the state of the record which prompted the Court of Appeals to find that Petitioner brought this action "against the Ship Building Company alleging negligence of the appellee under the laws of the State of Ohio, Ordinances of the City of Lorain, Ohio, and rules of the common law" and "tried the case as a conventional tort action without urging any applicable principle of maritime law." (petition p. 25.)

Yet, in the face of the record and the express finding by the Court of Appeals that Petitioner **did not** invoke the maritime law in the trial court, Petitioner now makes the unfounded representation to this Court (petition, p. 13) that the trial court was not misled and was "properly apprised of Petitioner's contention" and brazenly asks "What more could Petitioner do?" Petitioner never took the position in the Court of Appeals that he had advised the trial court of his admiralty claim and even now he cites

no reference to the record at all to show the matter was brought to the attention of the trial court. No such reference exists.

In the same irresponsible vein Petitioner asserts (petition p. 9) "The trial court incorrectly applied state law of Ohio * * * rejecting the contention that either statutory or non-statutory maritime law was applicable," but the record fails to show that Petitioner ever made such a contention in the trial court. As was said by this Court in *Dewey v. Des Moines*, 173 U. S. 193 (1899), at p. 200:

> "A point that was never raised cannot be said to have been decided adversely to a party who never set it up or alluded to it."

Petitioner also asserts (petition p. 13) that the trial judge had the duty to determine the matter "upon the proper jurisdictional basis" and (petition, p. 14) that the Court of Appeals had the duty to establish "the correct jurisdictional basis of the suit by curing any deemed defective averment of jurisdiction." But this is sheer pretense—Petitioner knows there was no defect in the jurisdictional averments. The petition itself admits (p. 2) that jurisdiction was rested upon "diversity of citizenship having the requisite jurisdictional amount" and as this was established by the pleadings (1b herein) and proof (9a) there can be no question of the trial court's jurisdiction.

The averment regarding the application of Ohio law went not to jurisdiction but to choice of law as is shown by *Curd v. Todd-Johnson Drydock*, 213 F. 2d 864 (C. A. 5—1954), a case practically on all fours with the present case. Plaintiff was a night mate on a steamer undergoing repairs at a shipyard. While he was descending a ladder from the vessel to the dock he slipped and fell to the dock. The ladder had been constructed and provided by the ship-

yard. Plaintiff brought suit against the shipyard in Federal Court alleging a breach of duty under Louisiana law, where the accident occurred, as the exclusive ground of recovery. The shipyard in its answer denied negligence and affirmatively alleged contributory negligence on the part of plaintiff.

From judgment on a verdict for defendant, plaintiff Curd appealed, assigning as error, among other things, the fact that the Court had charged the jury that contributory negligence would be a complete bar to recovery. In affirming the lower court, the Court of Appeals said, p. 866:

> "Appellant contends that the court committed error in instructing the jury that contributory negligence would be a complete bar to recovery. There was no error in that charge, *because this was a suit under Article 2315 of the LSA-Civil Code*, and the law of Louisiana to that effect was controlling. Vitale v. Checker Cab Co., 166 La. 527, 117 So. 579, 59 A. L. R. 148; Antoine v. Consolidated Vultee Aircraft Corp., La. App., 38 So. 2d 435. This was not an action in which the federal maritime law governed, as in Pope & Talbot v. Hawn, 346 U. S. 406, 74 S. Ct. 202; *it was an action under state law against one who was neither the owner of the ship nor the employer of the appellant.*" (Emphasis added.)

Petitioner also argues (petition p. 14) that the Court of Appeals' ruling thwarts the possibility of amendment of the pleadings "resulting from the extensive pretrial and discovery procedure consistently advanced by this Court as proper and equitable," but Petitioner conceals from this Court the fact that he propounded to Respondent extensive interrogatories—55 **in number**—(not printed), touching upon almost every conceivable aspect of the case, that Respondent answered each interrogatory without objection and that at no time thereafter did Petitioner amend

his pleadings or otherwise assert that he was relying on maritime law.

Petitioner's acquiescence in the trial court's disposition of the case under Ohio law without specific objection as required by Rule 46 puts him in the same position as the plaintiff in the *Curd* case, 213 F. 2d 864 (C. A. 5—1954) *supra,* where it appears that since plaintiff in that case made no specific objection to the charge complained of as required by Rule 51 F. R. C. P., he was not in position to assert such objection on appeal. The Court said,

> "While we recognize the power of an appellante court, in a proper case, to consider on its own motion errors to which no objections were made, such power should be exercised only in exceptional cases and in the interest of justice. Hormel v. Helvering, 312 U. S. 552, 61 S. Ct. 719, 85 L. ed. 1037; Dowell, Inc. v. Jowers, 5 Cir., 166 F. 2d 214, 2 A. L. R. 2d 442. *The purpose of the rule is to prevent a party, after verdict, from taking advantage of the giving of an erroneous instruction to which he failed to call attention in time to enable the court to correct it.* Palmer v. Hoffman, 318 U. S. 109, 63 S. Ct. 477, 87 L. Ed. 645. *By acquiescing in the court's instructions to the jury, the appellant may not now contend that the instructions were erroneous or that the applicable law was not what the court announced it to be.* On the face of the record, there is no plain error that calls for a reversal of the case." (Emphasis added.)

It is thus seen that the facts in the *Curd* case are virtually the same as in the case at bar. We will proceed to show that along with the Court in the *Curd* case and in the case at bar appellate courts follow the rule almost without exception that trial courts are properly confined to the issues raised by the pleadings and urged at the trial.

B. This Court and the Courts of Appeal follow the rule that they will not consider issues raised for the first time on appeal.

Petitioner's appeal was upon the ground that the trial court erroneously failed to apply admiralty law, but the Court of Appeals held, "upon cumulative authority" both in the Courts of Appeal and this Court that this theory of the case could not be asserted on appeal when it had never been raised in the trial court. In support of this rule of appellate practice, the Court cited numerous Courts of Appeal decisions.

The Court of Appeals cited in addition decisions of this Court; in one of which, *Virginia Railway Co. v. Mullens*, 271 U. S. 220 (1926), the Court said at page 227 speaking of the argument that in that particular case there was a contractual obligation to protect plaintiff's interest:

> "But he is not in a position to urge this contention here. The case stated in the complaint was distinctly in tort. There was no mention of a contract obligation * * * the case was treated, in keeping with the complaint, as one to recover damages for an alleged tortious creation and continuance of a nuisance. After bringing and trying the case on that theory the plaintiff cannot be permitted on this review to change to another which *the defendant was not required to meet below.*" (Emphasis added.)

As we will show, the case at bar did not involve a maritime tort at all; yet, in a situation unquestionably involving a maritime tort and where a defendant tardily asserted the application of maritime law, this Court in *Valley Steamship Co. v. Wattaw*, 244 U. S. 202 (1917), applied the same rule limiting the appeal to questions presented below. In that case an action was brought in an Ohio common pleas court alleging that plaintiff, a deck-

hand, on a steamer lying at Sandusky, Ohio, was injured by the shipowner's negligence and that the shipowner, although required to do so, was not a subscriber to the Ohio Workmen's Compensation Act, thereby affording plaintiff by the terms of said Act an action at law and denying defendant any common law defenses. In defense defendant alleged it was not required to subscribe to the Act because engaged in interstate commerce. Judgment upon a verdict for plaintiff was affirmed by the State Court of Appeals and petitions in error and for certiorari were denied by the Supreme Court of Ohio. Writ of error to this Court was sought on the ground (among others) that Article 3, Section 2 of the Constitution extended judicial powers to all cases of admiralty and maritime jurisdiction and thereby rendered the general maritime law not subject to alteration by State law.

This Court dismissed the writ of error for want of jurisdiction on the ground that the question was not properly presented to the trial court. The Court said, 244 U. S. p. 204:

> "The second reason for reversal now set up was not not presented to the trial court in any form. It was not pointed out clearly, if at all, by the petition in error before the Court of Appeals and was not definitely mentioned in the opinion of that court whose powers only extend to a review of the trial court's judgment for errors appearing on the record. Section 12,247, Ohio General Code, as amended by Ohio Laws 103, pp. 405, 431. The question therefore is not properly before us. Mutual Life Insurance Co. v. McGrew, 188 U. S. 291, 308, 309.
>
> The writ of error must be dismissed for want of jurisdiction."

Further, as pointed out by the Court of Appeals in the instant case by its citation of *Nelson v. County of Los*

Angeles, decided by this Court February 29, 1960, the same rule continues in force even to the raising of constitutional questions, many of which, of course, involve considerations of the life or liberty of a party. In short, the refusal of a Court of Appeals to consider a point not raised below is an exercise of discretion, *Madison v. Phillips*, 254 F. 2d 348 (C. A. D. of C.—1958) which will not be reviewed by this Court unless abuse appears. *Ray v. United States*, 301 U. S. 158, 166 (1937). Clearly the action of the Court of Appeals in following a uniform rule of appellate procedure does not present a "departure" from but rather shows adherence to "the accepted and usual course of judicial proceedings" referred to in Supreme Court Rule 19. Indeed only if the Court of Appeals had entertained Petitioner's novel claim would an abuse of discretion have been presented. *Union Pacific Railroad v. Johnson*, 249 F. 2d 674, 677 (C. A. 9—1957).

C. Petitioner's reliance upon Ohio law was correct; no maritime claim was involved.

Although Petitioner claims (petition p. 7) that the decision of the Court below is reviewable in connection with "four basic concepts of law," actually only one of these, the third (petition p. 14) in which Petitioner complains that "the Court below would not pass on the subject" of the applicability of maritime principles, is available as a question for review.

In regard to this question we have shown that it would constitute a serious abuse of discretion for an appellate court to pass upon a new and conflicting theory of the case, even if in itself meritorious, when such theory was never presented to the trial court.

But here the alternate theory was not meritorious, and the justice of the Court of Appeals' disposition of the

case is thereby fortified. Petitioner's new and conflicting theory of the case—the claim that maritime law applied—was not clearly meritorious and was at best highly questionable.

Petitioner's claim that maritime law applies—and all the remaining three of the four basic concepts of law which Petitioner says are challenged by the decision below—hang by the single thread of Petitioner's glib statement (petition p. 14) that "The gangway leading to a ship *has always been* considered an appurtenance thereof."

On the contrary the record in the present case conclusively showed that the gangway in question was an appurtenance of the shipyard—not of the ship. The gangway:

(a) Was not furnished by the ship (64a).

(b) Was not owned by the ship (63a).

(c) Was not in use for the convenience of the ship's personnel (19a, 58a, 60a).

(d) Was not the sole means of access to the ship (28a).

Instead the gangway in the present case was owned and furnished by the shipyard for the convenience of its own repairmen—as the petition admits (p. 4). In short, unlike the Steamer AYERS' regular boarding ladder which was furnished and put in place for the convenience of Petitioner—(regarding which Petitioner testified):

> "Q. And the Steamer AYERS also had boarding ladders like that one aboard ship too, didn't it?
>
> A. Yes, it did.
>
> Q. And the steamer did put that boarding ladder over the side by means of pulleys up to the stack?
>
> A. Yes, sir." (p 28a.)

which boarding ladder was, properly speaking, an adjunct of the ship), the ramp or brow or gangway from which Pe-

titioner fell was part of the shipyard equipment and, as such, appurtenant to the shipyard and its dock.

This being the evidence, Petitioner failed to meet the criterion for application of maritime la. laid down in *The Admiral Peoples*, 295 U. S. 649 (1935) (petition p. 14). That case involved an action in rem against the ship by one of the ship's passengers who fell from the ship's gangplank to the dock. The Court said, p. 651:

> "The basic fact in the instant case is that the gangplank was a part of the vessel. It was a part of the vessel's equipment which was placed in position to enable its passengers to reach the shore. It was no less a part of the vessel because in its extension to the dock it projected over the land * * *."

It should be emphasized that the Court in *The Admiral Peoples* did not lay down a hard and fast rule that *all* accidents on gangways were subject to maritime law or that *all* gangways must be considered part of the ship or must be deemed ship's equipment. Instead the Court prefaced the demarcation made in that case by saying, 295 U. S. p. 651:

> "This is one of the border cases *involving the close distinctions* which from time to time are necessary in applying the principles governing the admiralty jurisdiction."

The close distinction made in *The Admiral Peoples* was recognized in *U. S. F. & G. Co. v. United States*, 56 F. Supp. 452 (D. C. S. D. N. Y.—1944), where the Court speaking of that decision said at p. 453:

> "The determining factor there was said to be the fact that the means of travel was furnished by and was a part of the vessel."

The Court of Appeals for the Second Circuit in *Vega v. United States*, 191 F. 2d 921 (C. A. 2—1951), cert.

denied 343 U. S. 909, affirming 86 F. Supp. 293 (D. C. S. D. N. Y.—1949) upon the district judge's opinion made the same distinction in holding that an injury on a gangway platform, not a part of the vessel's equipment and not furnished by the vessel owner, was not within admiralty jurisdiction. In that case the Steamship ALCOA POLARIS, under bare boat charter to the United States, was moored to a pier undergoing conversion. The gangway and gangway platform "not a part of the ship's equipment" were similar in construction to the gangway in the case at bar (see Statement, *supra*, p. 3) and were erected by the shore contractor to facilitate ingress and egress of its employees engaged in the conversion. An employee of the shore contractor leaving the ship slipped and fell on the gangway platform on ice caused by the ship and brought a libel in admiralty against the United States. The libel was dismissed, the Court saying p. 293:

> "The court is of the opinion that the libel against the United States must also be dismissed for lack of jurisdiction over the subject matter of the action. Until the enactment of Public Law 695, Chapter 526, 62 Stat. 496, 46 U. S. C. A. § 740, on June 19, 1948, a tort was within the admiralty jurisdiction of the United States Courts only if the injury was done on navigable waters, or on some part of a vessel floating on navigable waters but not if it was done on land even by a vessel on navigable waters. See The Admiral Peoples, 295 U. S. 649, 55 S. Ct. 885, 79 L. Ed. 1633. The platform on which libellant slipped and fell was not a part of the Alcoa Polaris, nor attached to it. It was nailed and bolted to the pier. In contemplation of the law it is 'to be deemed an extension of the land.' Smith & Son v. Taylor, 276 U. S. 179, 182, 48 S. Ct. 228, 229, 72 L. Ed. 520. The libel must accordingly be dismissed as not within the admiralty jurisdiction of the United States, * * *."

Furthermore, unlike the situation in the present case, in *The Admiral Peoples* and in all of the cases cited by the petition (p. 15), except for the case of *Standard Oil Co. v. Robins Drydock and Repair Co.*, 32 F. 2d 182 (C. A. 2—1929), which did not involve any maritime claim at all, it was the vessel or vessel company which was being sued and the tortious conduct complained of emanated from the ship and either took effect aboard the ship proper or upon part of the ship's appurtenant equipment. In the circumstances of those and similar cases it was eminently fair that the admiralty jurisdiction to which a vessel owner is customarily subject could not be defeated by the accidental circumstance of "direction of travel" or technicality that the ultimate injury may have been sustained on land.

Suffice it to say that none of the authorities cited by Petitioner supports the application of maritime law to the present case and in our search we can find no such authority which so holds. The *Curd* case, 213 F. 2d 864, 866 (C. A. 5—1954), *supra*, which is practically on all fours with the present case supports the contrary conclusion. True, it is said in both *Ford v. Parker*, 52 F. Supp. 98 (D. C. Md.—1943) and *Caldaro v. B. & O. Railroad Co.*, 166 F. Supp. 833 (D. C. E. D. N. Y.—1956), that when a ladder or gangway constitutes the sole access to a vessel, it is in that sense part of the ship's equipment so that the party who furnishes it is not material, but in both these cases the claim was against the shipowner, the structure involved was the only available means for boarding the vessel, and in the *Caldaro* case the gangplank was the property of the ship and clearly part of its equipment.

Here the situation is significantly different—the party sued is not a vessel owner, the conduct complained of emanated from its operation on shore and allegedly took

place on part of its land based equipment. The gangway on which Petitioner fell was not attached to the vessel (63a, 64a). The gangway was attached to the platform, but the mere fact that the platform was attached to a vessel on navigable water—a vessel, which we wish to remind the Court was laid up for the winter and withdrawn from navigation—is, we submit, too feeble a connection to justify the ousting of the common law applicable to an occupier of land, such as this Respondent, and if such a thought ever occurred to Petitioner—who is and was represented by competent admiralty counsel—prior to the time he had lost in the trial court he must have rejected it as unrealistic and devoid of merit.

At best a claim for the application of maritime law in this case—a claim which was never made—would possibly have fallen in the "twilight zone" referred to in *Davis v. Department of Labor*, 317 U. S. 249, 254, 256 (1942), but in such event a presumption of constitutionality would have arisen in favor of state competence to deal with it. 317 U. S. p. 257.

CONCLUSION.

For the reasons foregoing it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

THOMAS V. KOYKKA,
1144 Union Commerce Building,
Cleveland 14, Ohio,
Counsel for Respondent.

ROBERT G. MCCREARY, JR.,
Of Counsel.

No. 33,453.

In the United States District Court

FOR THE NORTHERN DISTRICT OF OHIO,
EASTERN DIVISION.

PETER HOLM,

Plaintiff,

vs.

THE AMERICAN SHIP BUILDING COMPANY,

Defendant.

ANSWER.

Now comes the defendant, The American Ship Building Company, by its attorneys, Arter, Hadden, Wykoff & Van Duzer, and for answer to the complaint herein respectfully alleges as follows:

I.

Answering the allegations of the paragraph marked "FIRST" of the complaint, defendant admits that it is a New Jersey corporation and that in the conduct of its business maintains places of business in the State of Ohio.

II.

Answering the allegations of the paragraph marked "SECOND" of the complaint, defendant is without sufficient information to form a belief as to the truth of the allegation that plaintiff is a citizen of the State of Wisconsin and therefore denies the same. Defendant admits that the prayer of plaintiff's complaint exceeds the amount of Three Thousand Dollars ($3,000.00) exclusive of interest and costs, but denies that the plaintiff is entitled to recover any amount whatsoever.

III.

Answering the allegations of the paragraph marked "THIRD" of the complaint and without intending to deny that plaintiff was injured on or about March 8, 1955, defendant does deny that such injuries as plaintiff may have sustained occurred in the manner alleged and denies that plaintiff was injured in the manner or to the extent alleged in said paragraph marked "THIRD" of the complaint. Further, defendant denies each and every remaining allegation of said paragraph marked "THIRD" of the complaint.

IV.

Defendant denies each and every, all and singular, the allegations contained in the paragraphs marked "FOURTH," "FIFTH," "SIXTH," and "SEVENTH" of the complaint.

V.

Defendant denies each and every allegation contained in the complaint not hereinbefore specifically admitted to be true.

VI.

Further answering and by way of defense, defendant says that any injury or damage that plaintiff may have sustained on or about March 8, 1955 was caused solely and proximately by plaintiff's own carelessness, negligence and inattention for his own safety in the premises.

VII.

Further and by way of defense, defendant says that if it should be found upon the trial of this cause that defendant was negligent in any manner with respect to any injury or damage which plaintiff may have sustained by reason of the alleged occurrence of March 8, 1955, which defendant specifically denies, then and in that event, plaintiff's own carelessness, negligence and inattention for his own safety in the premises directly and proximately contributed to cause such injury or damage as plaintiff may have sustained.

VIII.

Further and by way of defense, defendant says that the area wherein the plaintiff was allegedly injured was well known to the plaintiff at all times and any injury or damage that plaintiff may have sustained by reason of the alleged occurrence of March 8, 1955 was caused by risks which were voluntarily assumed by the plaintiff.

WHEREFORE, having fully answered, defendant prays that the complaint herein be dismissed and that defendant may go hence with its costs.

ARTER, HADDEN, WYKOFF & VAN DUZER,
By /s/ ROBERT B. PRESTON,
Attorneys for Defendant;
The American Ship Building Company.

TRANSCRIPT OF EVIDENCE ON TRIAL.

* * * * *

PETER HOLM, the Plaintiff herein, called as a witness in his own behalf, being first duly sworn, was examined and testified as follows:

* * * * *

CROSS EXAMINATION OF PETER HOLM.

By Mr. McCreary:

* * * * *

(56) Q. There was a light up at the top of that gangway, was there not? A. Yes, sir.

Q. In fact you replaced the bulb in it on one occasion? A. Yes, sir.

Q. There was a switch on it, wasn't there? A. I think there was, yes.

Q. And it was a ship's light, using power from the shore? A. Right.

Q. It was part of your ship's equipment? A. The light was, yes.

(57) Q. And when that light was burning it enabled you to see sufficiently so you could see where you were going on the ramp, isn't that correct? A. Yes, sir.

* * * * *

(60) Q. And when you passed that position the light at the top of the gangway was burning, was it not? A. Not at that time of the day it wasn't, no, unless I forgot to leave it on. I was supposed to turn it off during the daytime.

Q. Do you say the light was not burning at that time when you left to go up town to get some groceries? A. I don't remember whether it was or not.

(61) Q. I ask you again, referring to your deposition, whether you testified as follows, and I am referring to the day of the accident:

"Q. When you left the ship to go down the ramp was the light burning at the top of the ramp?

"A. Yes, sir."

Did you so testify? A. Well, yes, I could have, yes.

Q. Do you admit you did so testify? A. Yes.

* * * * *

RE-DIRECT EXAMINATION OF PETER HOLM.

By Mr. Landskroner:

* * * * *

(78) Q. Now, can you tell us with reference to the lights. You have already stated that there was a light on top of the ramp, is that correct? A. Yes, sir.

Q. Now, was that light burning when you went up the ramp? A. Yes, sir.

* * * * *

(79) Q. How many watts in the bulb? A. I would say 60 or 70.

* * * * *

Thereupon the Plaintiff called as a witness MICHAEL T. DOUGHERTY, who, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION OF MICHAEL T. DOUGHERTY.

By Mr. Landskroner:

* * * * *

(86) Q. This is an ore boat, is it not? A. Yes, it is.

Q. Calling your attention to those little ladders on the side, whatever they are—what are they? A. Those are the ladders the crew uses to go aboard and leave the ship when the ship is in operation in the summer sailing season.

* * * * *

Thereupon the Plaintiff called as a witness A. W. HAAS, who, being first duly sworn, was examined and testified as follows:

* * * * *

CROSS EXAMINATION OF A. W. HAAS.

By Mr. McCreary:

* * * * *

(105) Q. You were asked about the wattage of the lights at the head of the gangway. Were there any other lights burning (106) in the area? A. Yes, there was.

Q. Did you have anything to do with turning those lights on? A. Yes, sir, I turned those lights on at 6 o'clock.

Q. And were you then making your rounds? A. Making the 6 o'clock rounds, yes, sir.

Q. Had Mr. Holm started back to the ship before 6 o'clock? A. Yes, sir.

Q. Was it daylight at that time? A. Yes, sir.

Q. And how long did it remain daylight? A. It remained daylight till about 6:45, 6:50.

Q. And when you went by the gangway were the lights still burning that you had turned on? A. Yes, sir.

Q. How far away was the closest light to the midship section of the Steamer Ayers where the ramp was? A. That would be the pole lights, the flood lights on the pole. Those poles are 65 feet high and there is three bulbs on the cross bar up above, three bulbs in those flood lights. They have reflectors on them and those bulbs are 1500-

watt bulbs apiece, and they were six bulbs burning on the Burton Ayers.

Q. You mean they were directed towards the Burton Ayers? (107) A. Yes, they are focused, in other words, put on these poles, and they are shined to the after end or forward end of the boat. It was all lit up down there.

Q. And were those lights burning continuously from the time you turned them on? A. Yes, sir.

Q. And did they provide good illumination on the ramp? A. Yes, sir.

Q. Or gangway? A. Yes, sir.

* * * * *

Thereupon the plaintiff called as a witness GORDON STAFFORD, who, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION OF GORDON STAFFORD.

By Mr. Landskroner:

* * * * *

(119) Q. How did they get over the Ayers? A. Went up the ramp and across the deck of the Ayers there. (120) They would go over a little ramp which was made out of planking, with handrail guards on it, and walk across and go over to the deck of the boat alongside.

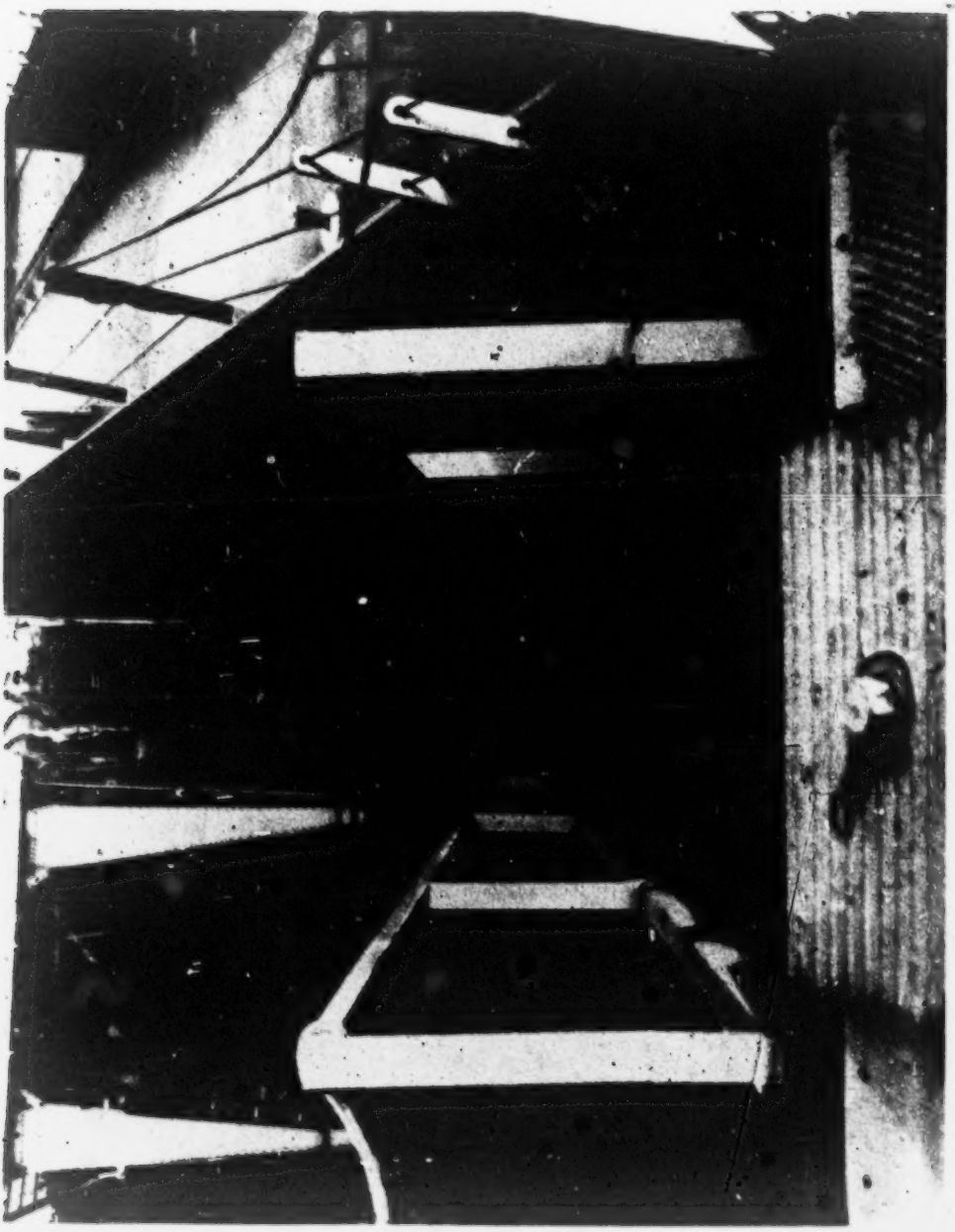
* * * * *

PLAINTIFF'S EXHIBIT 2.

Side View of Gangway.

PLAINTIFF'S EXHIBIT 1.

View of Gangway From Top.



DEFENDANT'S EXHIBIT B.

View of Gangway From Bottom.